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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 564

MRS. VIOLET ROSE FOY,
Individually, and as
Tutrix of her minor children,
TOMMY RAY FOY, SCOTTY JOE FOY and LEROY FOY,
Plaintiff-Appellee,

versus

ED TAUSSIG, INC.
and
THE TRAVELERS INSURANCE COMPANY,
Defendants-Appellants.

PETITION FOR WRIT OF CERTIORARI TO THE
LOUISIANA SUPREME COURT

SAMUEL C. GAINSBURGH
Kierr & Gainsburgh
1718 National Bank of Commerce
Building
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and
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and LEROY FOY,
Plaintiff-Appellee,

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ED TAUSSIG, INC.
and
THE TRAVELERS INSURANCE COMPANY,
Defendants-Appellants

PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

SAMUEL C. GAINSBURGH and WM. B. BAGGETT, on behalf of petitioner, pray that a writ of certiorari issue to review the judgment of the Louisiana Supreme Court entered in the above case on June 9, 1969.

OPINIONS BELOW

The opinion of the Fourteenth Judicial District Court, State of Louisiana, Parish of Calcasieu, is unreported, and appears at Appendix A, *infra*, pages 19-20. The opinion of the Louisiana Court of Appeal, Third

Circuit, is reported at 220 So. 2d 229 (La. App. 3 Cir. 1969), and appears at Appendix B, *infra*, pages 21-45. The Louisiana Supreme Court denied writ of certiorari to the Louisiana Court of Appeal, Third Circuit. That judgment is reported at La. 222 So. 2d 884, 885, and is attached at Appendix C, *infra*, pages 46-47.

JURISDICTION

The judgment of the Louisiana Supreme Court was made and entered on June 9, 1969. See Appendix C.

The judgments of the courts below are in conflict with the United States Constitution, Amendment VII, and the Due Process Clause of the United States Constitution, Amendment XIV. This petition for certiorari was filed less than ninety (90) days from the entering of the decree of the Louisiana Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

The Louisiana Court of Appeal, Third Circuit, revised findings of fact made by the jury in a civil suit for damages when an evaluation of all the evidence demonstrated that the jury's verdict was fair and reasonable. The Louisiana Supreme Court denied writ of certiorari to review that judgment. Thus, the issues presented are:

1. Does the United States Constitution, Amendments VII and XIV, prohibit review by state appellate courts

in a suit for personal damages except in accordance with the rules of the common law, so as to prevent re-examination of facts found by a jury in a state court trial when the jury's damage award is not so excessive as to be unconscionable?

2. Is a jury's evaluation of damages in a personal injury suit a finding of fact within the meaning of the United States Constitution, Amendment VII?

3. May a state appellate court render a judgment for a lesser amount of general damages than that found by a jury?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

FEDERAL CONSTITUTIONAL PROVISIONS:

United States Constitution, Amendment VII:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise examined in any Court of the United States, than according to the rules of the common law."

United States Constitution, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

FEDERAL STATUTES:

28 U.S.C. § 1257 (3):

"By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

STATE CONSTITUTIONAL PROVISIONS:

Louisiana Constitution of 1921, Article VII, Section 10, as amended:

"The Supreme Court has control, and general supervisory jurisdiction over all inferior courts.

* * * *

"In civil cases, its appellate jurisdiction extends to both the law and the facts. In criminal matters, its appellate jurisdiction extends to questions of law only."

Louisiana Constitution of 1921, Article VII, Section 29, as amended:

"All appeals of which the Courts of Appeal have appellate jurisdiction . . . shall be on both the law and the facts, except where the appeal is limited to questions of law only by any other Section of this Constitution."

STATE STATUTES:

Article 2315, Louisiana Revised Civil Code (1870):

"Every act whatever of man causes damages to another, obliges him by whose fault it happened to repair it."

Louisiana Code of Civil Procedure, Article 1731 (1960):

"Except as limited by Articles 1733, the right of trial by jury is recognized.

"The nature and amount of the principal demand shall determine whether any issue in the principal or incidental demand is triable by jury."

Official comments to the text state:

"This article serves the same purpose as Fed. Rule 38 (a), which provides that the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

STATEMENT OF FACTS

In an action for wrongful death of the petitioner's husband, and for injuries sustained by the petitioner and her minor children in an automobile accident brought against the automobile dealer, his repairman, and an agent of the dealer, on the ground that the accelerator of a recently purchased automobile stuck, causing the accident, the Fourteenth Judicial District Court, Parish of Calcasieu, State of Louisiana, entered judgment against the automobile dealer in favor of the petitioner, individually, and for the children of the decedent. After denial of motion for a new trial, the dealer and its insurer appealed.

The Louisiana Court of Appeal, Third Circuit, reversed in part the factual findings of the jury, rejecting the award of $31,000.00 to the petitioner *in toto*, and held that the jury over-evaluated the amount of damages sustained by the minor children of the decedent. The Court therefore reduced the award of SCOTTY JOE FOY from $18,000.00 to $7,500.00; the award to LEROY FOY was reduced from $20,000.00 to $1,000.00;

and the award to TOMMY RAY FOY was reduced from $20,000.00 to $3,000.00.

On application for rehearing to the Louisiana Court of Appeal, Third Circuit, the petitioner, in her brief in support of application for rehearing, argued that the Constitution of the United States, Amendment VII, providing in part that:

> ". . . . the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined by any Court of the United States than according to the rules of common law."

prohibits such a reversal of factual findings of a jury.

The Louisiana Court of Appeal, Third Circuit, denied on April 2, 1969, petitioner's application for rehearing, and completely ignored the issue of whether the Court was violating the Constitution of the United States, Amendment VII. The petitioner then applied for a writ of certiorari to the Louisiana Supreme Court on May 1, 1969, arguing that the Louisiana Court of Appeal, Third Circuit, erred in examining the findings of a jury by other than common-law principles, contrary to the United States Constitution, Amendments VII and XIV.

The Supreme Court of Louisiana denied the petitioner's application for writs on June 9, 1969, stating:

> "According to the facts of this case as found

to be by the Court of Appeal, there appears no error of law in the judgment complained of."

REASONS FOR GRANTING THE WRIT

The suit in this case was based on Article 2315 of the Louisiana Revised Civil Code (1870), the state's general tort article, which imposes civil liability for negligent conduct causing injury. Article 2315 has been specifically held to be:

". . . An embodiment of the common-law right of action for tort. ."

Gray vs. New Orleans Dry Dock and Shipbuilding Company, 146 La. 826, 84 So. 109 (1920). Thus, the instant suit is a suit at common law within the meaning of the Constitution of the United States, Amendment VII.

We submit that the judgment of the Louisiana Court of Appeal, Third Circuit, violates the Constitution of the United States, Amendment VII, providing that no fact tried to a jury shall be otherwise re-examined except in accordance with the rules of common law. The judgment of the Louisiana Court of Appeal, Third Circuit, further violates the Constitution of the United States, Amendment XIV, by abridging the privileges or immunities of the citizens of the State of Louisiana and depriving them of property without due process of law.

One of the privileges of the petitioner in the instant

case was that of having the amount of damages fixed by a jury in a manner consistent with the principles of the common law and of the Constitution of the United States, Amendment VII.

We do not argue that an appellate court does not have the prerogative to find that a jury's award for damages is so excessive as to be unconscionable, but we do submit that the provisions of Louisiana Constitution of 1921, Article VII, Sections 10 and 29, granting Louisiana Appellate Courts the power to arbitrarily re-appraise jury findings of fact and their awards for damages in personal injury suits, are in conflict with the Constitution of the United States, Amendment VII.

The right to a jury trial in a civil suit for personal damages was stated in *Parsons vs. Bedford,* 7 L. Ed. 432 (1830) as:

> ". . . a fundamental guarantee of the rights and liberties of the people. . ."

Similarly, *Levingston vs. Moore,* 8 L. Ed. 751 (1833) considered such a right to be:

> ". . . among the most inestimable privileges of a free man . . ."

> "Since the earliest days of our government, the fear that the findings of one's peers in a civil case may be subverted by the officials of government has prompted the protectors of

our liberties to guarantee that such a situation will never exist."

Capital Transaction Company vs. Hoff, 19 S. Ct 595, observes:

> "A comparison of the language of the Seventh Amendment . . . with the declaration of rights of 1774 . . . and with the amendments introduced by Mr. Madison in Congress in 1789, strongly tends to the conclusion that the Seventh Amendment, in declaring that no fact tried by jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law had in view the the rules of common law of England and not the rules of that laws modified by local statute or usage of any of the states.
>
> "The Common law here alluded to is not the common law of any individual state, for it probably differs in all [states], but it is the common law of England, the grand reservoir of all our jurisprudence. Now according to the rules of the common law, the facts once tried by a jury are never re-examined . . . this is the invariable usage, settled by the decision of ages."

Ironically, in 1812, (at the time when Louisiana joined the Union), the right of the jury to determine the facts in a civil suit was being challenged in the New England states. *United States vs. Wonson,* 1 Gal. 5 Fed. Cases No. 16, 750, menioned in *Capital Trans-*

action Company, cited above. In rejecting the argument that state appellate courts had the authority to re-examine findings of fact made by a jury, the United States Supreme Court stated:

> "We should search in vain in the common law, for an instance of an appellate court retrying the case by jury, while the former verdict and jury remained in full force."(19 S. Ct. 595).

But for the seriousness of the issue in the present case, it would appear almost humorous that we Louisianians have the dubious distinction of being the only citizens of the United States whose jury-found facts in civil cases are vunerable to unlimited appellate review. Thus, today there is no real right to determination of factual issues by the petitioner's peers in Louisiana, despite the provisions of the Constitution of the United States, Amendments VII and XIV.

As early as 1897, the right to jury trial in civil cases as guaranteed by the Constitution of the United States, Amendment VII, was stated by this Court to apply to suits at common law before a jury in a state court. In *Chicago vs. B & W R Company*, 166 U.S. 242, 17 S. Ct. 581 (1897), the court stated:

> "It is clear that the last clause of the Seventh Amendment is not restricted in its application to suits of common law tried before a jury in the courts of the United States. It applies equally to a case tried before a jury in a state

court, and brought here by writ of error from the highest court of the state."

The importance of the right to trial by jury (with no re-evaluation of the facts by an appellate court) is most succinctly stated in *Blackstone's Commentaries*, Gavit Ed. 689-90 (1941), in which that imminent jurist stated:

> "The trial by jury is looked upon as the glory of the English law, . . . an advantage in regulating the civil property . . . the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals."

Blackstone further observed:

> "If [fair and equitable administration of justice] be entirely trusted to the majestry, a select body of men, usually chosen . . . by parties holding the highest office in the state, their decisions will frequently have an involuntary bias toward those of their own rank and dignity; for it is not to be expected, that the few should always be attentive to the interest and good of the many.
>
> "This therefore preserves in the hands of the people that share which they ought to have in the administration of public justice, and

prevents the encroachments of the more powerful and wealthy citizens."

This writ should be granted because failure to do so will result in an illusionary, rather than a real, right to trial by jury for the citizens of Louisiana. Although the Constitution and the Legislature of the State of Louisiana have granted such an illusionary right, in practice the appellate courts of the state withhold the privilege of jury trial by the act of re-examining the jury's findings on appellate review. We submit that in the context of the instant case, such action is an unconstitutional assumption of power by the appellate courts of Louisiana, resulting in a denial of constitutional due process.

The enactments of the Legislature of Louisiana clearly intend that the citizens of Louisiana are to be guaranteed that the findings of fact made by a jury in a civil case are to be conclusive. This right under Louisiana law is clearly consistent with the common law concept of jury trial as contemplated by the Constitution of the United States, Amendment VII. *Capital Transaction Company vs. Hoff,* 19 S. Ct. 595. The right of jury trial is one of the basic guarantees of liberty and such a guarantee is one of the highest traditions protecting the rights of the ordinary citizens against encroachment by governmental authority. An encroachment on this guarantee exists when a state appellate court consisting of three, five, or seven men, can reach a conclusion contrary to the conclusion of facts found by the jury when their only basis doing so is a reading of a printed record of the evidence. Such

a practice denies the citizens of Louisiana the invaluable right of a jury trial, and is in clear contravention of the due process clause of the constitution of the United States, Amendments VII and XIV.

Such a result, in point of fact, permits the state judiciary to determine what is due process under the Constitution of the United States. Such a concept is in direct conflict with holdings of this Honorable Court. *Davidson vs. New Orleans*, 96 U.S. 97; *Chicago B & WR Company vs. Citizens of Chicago*, 166 U.S. 242; 17 S. Ct. 581 (1897).

The constraints of the Constitution are just as binding on state judiciary as on federal courts. The theory of our governments, both state and national, is against the deposit of unlimited powers anywhere. Such unlimited power in any one branch of the government violates the principle of the essential nature of all free governments and infringes upon reservations of individual rights, a cornerstone of our system of government.

Trial by jury is an essential part of Anglo-American Judicial Process and it therefore follows that the right to trial by jury as contemplated by the common law is an essential part of due process embodied in the Constitution of the United States, Amendment XIV. Further, the right to trial by jury in civil cases is inexorably bound to our concept of government by the people. We submit that there is nothing more fundamental and essential to the rights of individual citizens in a free democracy than the right to be judged

by one's peers. The right to trial by jury is a political right essential to a democratic process, representing the direct participation of the governed in their government.

The federal policy favoring jury trials has been receiving increasing importance in the last few years. We submit that this established federal policy can only be fully implemented by the holding of this Honorable Court that the right to jury trial is to be determined according to the Constitution of the United States, thus obtaining the uniformity in its exercise which is demanded by Amendments VII and XIV.

Further, we submit that a determination of a state-created claim can be made equitable and just only by extending the right to a jury trial as provided by Amendment VII to the individual states. When a case is one involving a federal question tried before a jury in a state court (as in a FELA or Jones Act case), Louisiana appellate courts are prohibited from re-examining findings of fact made by the jury. However, a suit based on a state-created right is subject to arbitrary appellate review of the facts.

A trial by jury is too important and fundamental to the American system of justice to permit a state court greater power than the United States Supreme Court where interpretation of the laws of the United States and of the Constitution of the United States are involved, and is equally important in civil cases based on state-created claims.

A complete negation of the common law right to a trial by jury of one's equals is, unfortunately, a fact of life for the citizens of Louisiana in state courts. Paradoxically, a Louisiana citizen who can show diversity of citizenship can obtain his full rights under the Constitution of the United States, Amendment VII, in federal court, but if that citizen is unable to establish diversity of citizenship, he is denied one of the basic rights of a citizen of the United States: The privilege of a jury trial, even though the same state law and the same facts are involved in both cases. This obviously leads to forum shopping in cases and controversies in Louisiana, a practice which has been universally condemned by both the courts and legal scholars. Further, it allows Louisiana appellate courts the right to do that which this Court has denied to itself and all federal courts in deference to the prescription of the Constitution of the United States, Amendment VII.

CONCLUSION

WHEREFORE PETITIONER RESPECTFULLY PRAYS that a writ of certiorari issue in due course as provided for by law and the rules of this Court.

Respectfully submitted,

SAMUEL C. GAINSBURGH
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New Orleans, Louisiana

and

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Baggett, Hawsey & McClain
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P. O. Box 1645
Lake Charles, Louisiana 70601

By _____
SAMUEL C. GAINSBURGH
ATTORNEYS FOR
PETITIONER

CERTIFICATE OF SERVICE

I, SAMUEL C. GAINSBURGH, counsel for petitioner and a member of the bar of the United States Supreme Court, do hereby certify that a copy of the foregoing petition for writ of certiorari has been served on the parties hereto by U. S. mail, in a properly addressed envelope, postage prepaid, as follows, to-wit:

Honorable Val J. Courville
Clerk, Louisiana Supreme Court
301 Loyola Avenue, Room 220
New Orleans, Louisiana

Mr. Edmund E. Woodley
Holt & Woodley
P. O. Drawer EE
Lake Charles, Louisiana
Attorney for Ed Taussig, Inc. and
The Travelers Insurance Company

Mr. Lloyd E. Hennigan, Jr.
P. O. Box 3223
Lake Charles, Louisiana
Attorney for Eddie L. Ellzey

Mr. Rufus LaPointe
Rt. 1 Box 20
Westlake, Louisiana

New Orleans, Louisiana, this____day of September, 1969.

_____

SAMUEL C. GAINSBURGH

APPENDIX "A"

14TH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA
PARISH OF CALCASIEU

MRS. VIOLET ROSE FOY, individually and as tutrix of her minor children, TOMMY RAY FOY, SCOTTY JOE FOY and LEROY FOY

versus No. 72,613

ED TAUSSIG, INC.,
TRAVELERS INSURANCE COMPANY,
EDDIE L. ELLZEY and RUFUS LAPOINTE

SPECIAL VERDICT OF JURY

1. Verdict for defendants, Ed Taussig, Inc., and Travelers Insurance Company.

ANSWER AGAINST
FOR or AGAINST

2. Verdict for defendant, Eddie L. Ellzey

ANSWER FOR
FOR or AGAINST

3. Verdict for defendant, Rufus LaPointe

ANSWER FOR
FOR or AGAINST

If your answer to the above three verdicts is "FOR", the defendants, then you are not to consider any of the following verdicts submitted to you and you are to return to Court. If, however, the answer to any of the above verdicts is "AGAINST" any of the defendants, then you are to answer the remaining verdicts.

4. Verdict for plaintiff, Violet Rose Foy, Individually.
ANSWER $31,000

5. Verdict for plaintiff, Violet Rose Foy, as administratrix of the estate of her minor children:

1)	Scotty Joe Foy	$18,000
2)	Tommy Ray Foy	$20,000
3)	Leroy Foy	$20,000

(Signed) DAN WHELCHEL, JR.
FOREMAN

May 16, 1968
FILED May 16, 1968
(Signed) JO HOGGE
Deputy Clerk of Court
Calcasieu Parish, Louisiana

APPENDIX "B"

NUMBER 2553

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

MRS. VIOLET ROSE FOY, Individually and as Tutrix of her Minor Children, TOMMY RAY FOY, SCOTTY JOE FOY and LEROY FOY
Plaintiffs-Appellants,

versus

ED TAUSSIG, INC., and
TRAVELERS INSURANCE COMPANY
Defendants-Appellants;

And

EDDIE L. ELLZEY and RUFUS LAPOINTE
Defendants-Appellees.

Appeal from the Fourteenth Judicial District Court for the Parish of Calcasieu, State of Louisiana, Honorable Earl E. Veron, District Judge, presiding.

Before FRUGE, SAVOY and HOOD, Judges.

HOOD, Judge.

This is an action for damages instituted by Mrs. Violet Rose Foy, individually and in behalf of her three minor children, against Ed Taussig, Inc., The Travel-

ers Insurance Company (Taussig's insurer), Eddie L. Ellzey and Rufus LaPointe. Plaintiff claims damages for personal injuries sustained by her and by her three minor children, and for the alleged wrongful death of her husband, Fred Foy, all arising out of an automobile accident which occurred on December 3, 1966.

The case was tried by jury, with the result that a verdict was rendered in favor of plaintiff, individually and for the children, and against Taussig and Travelers. By the same verdict plaintiff's demands against the remaining defendants, Ellzey and LaPointe, were rejected. Judgment was rendered by the trial court in accordance with that verdict.

After the judgment had been rendered, defendants Taussig and Travelers timely filed a motion for a new trial, which motion was denied by the trial court. In his reasons for denying that motion, the trial judge stated the "*the court does not agree with the decision,* but under our procedure the Court is powerless to order an additur or a remittitur." He reasoned that the granting of a new trial would make it necessary to relitigate the entire case, and eventually it would be appealed anyway on substantially the same evidence. Although he disagreed with the verdict, he felt that it was "to the best interest of all parties concerned to deny the motion for a new trial and let the Court of Appeal pass on the decision."

After the motion for a new trial was denied, appeals were taken by defendants, Taussig and Travelers, and by plaintiff, individually and in behalf of her minor children.

A number of factual and legal issues are presented on this appeal. One important factual issue to be determined is whether the accelerator of the car, in which the decedent and his family were riding at the time the accident occurred, stuck immediately before that accident, and, if so, whether the sticking of the accelerator was a proximate cause of the accident.

The accident occurred about 6:00 p.m., on December 3, 1966, near the intersection of Magnolia Street and Sulphur Avenue, in the Town of Westlake. Immediately prior to that time, the decedent, his wife and their three children were riding in a 1959 Pontiac automobile, traveling north on Magnolia Street toward the point where that street runs into or joins Sulphur Avenue. These two streets form a "T" intersection there, with Sulphur Avenue running east and west and forming the top of the "T". Mr. Foy, the decedent, was driving and his wife was sitting in the front seat with him. Upon reaching the intersection, Mr. Foy stopped the car and allowed a vehicle on Sulphur Avenue to traverse the crossing. He then depressed the accelerator of the car with his foot, causing the car to move forward up a slight incline and into the intersection, his purpose being to turn to his left and to proceed west on Sulphur Avenue. About that time the car suddenly began to gain speed, and Foy lost control of it. It ran off the north side of Sulphur Avenue, traveled in a northwesterly direction across a small ditch and culvert and into the front lawn of the Westlake High School, and it then ran into a tree located on the school grounds. The tree was located 150 feet northwest of the center of the intersection. As a result of that ac-

cident Mr. Foy was killed almost instantly, and Mrs. Foy and the three children were injured.

The automobile involved in this accident had been purchased by the Foys about 9:00 or 10:00 o'clock that morning, at a used car lot in Westlake. The used car lot was being managed by defendant Ellzey at that time, and a sign on the lot indicated that it was owned and operated by defendant Taussig. Mr. and Mrs. Foy, with their children, drove to the used car lot that morning in another automobile owned by them, and after negotiating with Ellzey, they bought this 1959 Pontiac for $350.00. They paid cash for the car and it was purchased in Mrs. Foy's name. Immediately after the sale was completed, Robert L. LeBouef, who worked at the car lot, drove the Pontiac to the Foy residence in Westlake, while Mr. and Mrs. Foy followed him in their other automobile. After arriving at the Foy residence, the entire Foy family got in the Pontiac, with Mr. Foy driving, and they took LeBouef back to the used car lot. As the decedent was driving into the car lot, the accelerator of the car stuck, causing the car to lurch forward. Mr. Foy applied the brakes, however, and LeBouef turned off the ignition key, and the car was brought to a stop before any damages were caused.

Foy and Ellzey discussed the fact that the accelerator had stuck, and Ellzey agreed to have it repaired. Ellzey told Foy to drive the car to his home, and he promised to send a mechanic out that afternoon to fix the accelerator. Mr. Foy then drove the car back to his home, and he experienced no difficulty with the accelerator on that trip. Defendant LaPointe, a

mechanic who was regularly employed by Taussig, went to the Foy residence between 1:00 and 3:00 o'clock that afternoon, pursuant to Ellzey's instructions, and he worked on the accelerator for about 20 minutes. He then told Mrs. Foy that the necessary repairs had been made and that it was all right for them to drive the car.

LaPointe testified that upon inspecting the car on that occasion he found that a "linkage," which connected the accelerator to the carburetor, had been bent, and that this was causing the accelerator to stick. He stated that he removed the linkage, straightened it out, replaced it and then tested the accelerator and determined that it would function properly, without sticking. He felt that the repairs which he made corrected the difficulty, and that the accelerator would not stick after he completed those repairs.

As we have already noted, this car was involved in an accident about 6:00 o'clock that same afternoon. Plaintiff contends that the accelerator of the car stuck as her husband was endeavoring to enter the intersection of Magnolia Street and Sulphur Avenue, and that the sticking of the accelerator was the sole proximate cause of the accident. She alleges that the car had been purchased from defendant Taussig, that it had a defective accelerator, and that all of the defendants are liable because of the breach of an express and implied warranty. She alleges that defendants Ellzey and LaPointe are liable on the additional ground that those defendants were negligent in selling, repairing and representing to her that the purchased automobile was safe and reasonably fit for the purposes for which

it was sold, when it was known that the automobile was defective and unsafe for use.

The jury obviously concluded that the accelerator of the car stuck, and that the sticking of the accelerator was a proximate cause of the accident, because that is the only basis upon which Taussig and its insurer could have been held to be liable. Although the trial judge stated that he disagreed with the verdict, he did not specify the findings which he considered to be erroneous.

Mrs. Foy testified that immediately before the collision occurred she saw the accelerator on the floorboard after her husband had removed his foot from it. She stated that she reached down and was endeavoring to pull the accelerator up with her hand when the car struck the tree. This testimony, together with the fact that the accelerator had stuck earlier that same day, indicates that the accelerator actually was defective and had stuck. Four mechanics testified, however, that as a safety factor an extra strong spring had been attached to the linkage between the accelerator and the carburetor, which spring should have prevented the accelerator from sticking. The evidence also shows that the carburetor was in a closed position after the accident had occurred, but the mechanics concede that the force of the impact could have caused the carburetor to close, even though it had been open at the time of the collision.

We have reviewed the evidence, and we conclude, as did the jury, that the accelerator actually did stick,

and that the malfunction of that part of the car constituted a proximate cause of the accident.

The next factual issue presented is whether Mr. Foy was intoxicated at the time the accident occurred, and if so whether his intoxication was a proximate and contributing cause of the accident.

Mrs. Foy testified that her husband had been drinking heavily and that he was under the influence of intoxicating liquor when they went to the used car lot and purchased the Pontiac automobile that morning. She stated, however, that he slept from about 12:30 to 5:20 p.m. that day, that he had nothing more to drink after he went to sleep, and that he was not intoxicated at the time the accident occurred. Her 14 year old son, Tommy Foy, testified substantially to the same effect, except that he conceded that his father had had a bottle of whiskey in the car with him that morning and also that afternoon at the time the accident occurred.

Two service station attendants testified that they put gas in the car for Mr. Foy about ten or fifteen minutes before the accident occurred, and that in their opinions the decedent was highly intoxicated at that time. One of them stated "You could tell he was drinking real heavy by the way he talked," by the fact that he kept trying to start the motor of the car while it was running, and by the smell. The other attendant testified that he obviously was intoxicated, that "he kind of mumbled like," that "he kept kind of nodding his head a little bit like he was about to go to sleep

or something," and that he insisted on putting some gas in the car although the tank was full.

Immediately after the accident occurred a pint bottle of whiskey, about half full, was found in the front seat of the wrecked car. Also a sample of the decedent's blood was taken shortly after his death, and tests made of that blood by a pathologist revealed that the alcoholic content of the decedent's blood was 285 milligrams per cent, or .285 grams. According to the pathologist, this finding constitutes definite evidence of intoxication. He testified, "A person with 285 milligrams of alcohol in the blood stream, and bathing his brain and nerve cells, would certainly have difficulty in seeing, hearing, reasoning, comprehension of problems, coordination of muscles and the performance of even simple tasks without great difficulty."

Plaintiff contends that the trial court erred in permitting evidence as to this blood test to be presented to the jury, and that the evidence as to such a test should not be considered by us on this appeal. The principle grounds for that argument are that defendants failed to show that the embalmer actually took a sample of the decedent's blood. Alternatively, she contends that the sample was not properly taken and preserved for the pathologist and that the evidence failed to show that the sample tested was the one which had been taken from the decedent. We are convinced that the blood sample tested by the pathologist was actually a sample of the decedent's blood, that the tests made on that sample revealed the alcoholic content of the decedent's blood, and that the results of the test were properly admitted as evidence. We also

feel that, even without considering the results of this blood test, the evidence shows that the decedent was highly intoxicated at the time the accident occurred.

Photographs of the scene of the accident show that the school grounds were spacious and that there were very few trees on those grounds. If the decedent had not been intoxicated, we think he could and would have avoided a collision with one of the very few trees which were there, even though the accelerator did stick. Also, it is reasonable to conclude that were it not for his intoxicated condition, the decedent would have exercised the same degree of care as he had exercised earlier that day when the accelerator first became stuck on the used car lot.

Our conclusion is that the decedent was intoxicated at the time the accident occurred, that he was negligent in attempting to drive the car while he was in that condition, and that his negligence in that respect was a proximate and contributing cause of the accident.

Since the negligence of the decedent was a proximate and contributing cause of the accident, then regardless of the conclusions which may be reached as to the negligence of any of the defendants, plaintiff and her children are barred by the decedent's contributory negligence from recovering damages for his death. Malveaux v. Buller, 135 So. 2d 368 (La. App. 3d Cir. 1961); Vitale v. Checker Cab Co., 166 La. 527, 117 So. 579 (1928); Smith v. Illinois Cent. R. Co., 120 So. 405 (La. App. Orl. Cir. 1929); Smith v. Monroe Grocer Co., 179 So. 495 (La. App. 2d Cir. 1938); McGuire v.

Louisiana Baptist Encampment, 199 So. 192 (La. App. 1st Cir. 1941). The portion of the judgment which awards damages for the death of the decedent, therefore, must be reversed.

Defendants also contend that Mrs. Foy is barred from recovering damages for her own personal injuries, as well as for the death of her husband, because of contributory negligence or assumption of the risk. It is argued that she knew that Mr. Foy had been drinking throughout the day, and that she assumed the risk of riding in the car which he was driving while he was in an intoxicated condition. The evidence establishes that Mrs. Foy was aware, or she should have been aware, of her husband's intoxicated condition when she voluntarily rode in the car with him at the time the accident occurred.

When an accident occurs involving a driver whose mental or physical faculties have been materially impaired due to the influence of intoxicants, a guest passenger who knows or should know of the driver's condition and nevertheless voluntarily rides with him cannot recover for injuries received in an accident caused in whole or in part by the driver's negligence, if the alcohol induced impairment of the driver's ability is a substantial contributory cause of the driver's negligence. Viator v. Grain Dealers Mutual Insurance Company, 182 So. 2d 165 (La. App. 3d Cir. 1966); Roller v. Cormier, 192 So. 2d 568 (La. App. 3d Cir. 1966); Wright v. State Farm Mutual Automobile Ins. Co., 194 So. 2d 799 (La. App. 2d Cir. 1967); Elba v. Thomas, 59 So. 2d 732 (La. App. Orl. Cir. 1952).

Since Mrs. Foy was, or should have been, aware of the fact that the decedent was under the influence of intoxicants when she voluntarily rode in the car with him, and since Mr. Foy's intoxicated condition was a substantial contributing cause of the accident, we must conclude that Mrs. Foy assumed the risk and thus she is barred from recovering damages for the personal injuries which she sustained. The judgment appealed from must be reversed; therefore, insofar as it awards damages to Mrs. Foy, individually.

The minor children who were in the car, of course, are not chargeable with contributory negligence or assumption of the risk, and plaintiff thus is not barred on those grounds from recovering damages in behalf of such children.

The next factual issue which must be determined is whether the Pontiac automobile was sold to the Foys by Taussig, through its agents or employees. Plaintiff, and defendants Ellzey and LaPointe, contend that the car was sold by Taussig, and that the latter and its insurer are liable in damages because of a breach of warranty. Taussig contends that it did not sell the car to the Foys, that the vehicle was owned by Ellzey at the time of that sale, and that the sale thus was from Ellzey to the Foys. Alternatively, they contend that Ellzey acquired title to the car after he had sold it to the Foys, and that the doctrine of after acquired title thus is applicable.

James B. Gardiner, who was the used car manager for Taussig at that time, testified that at about 9:00 a.m. on December 3, 1966, he agreed with Ellzey that

the latter would purchase the Pontiac automobile from Taussig for $200.00, and that later that day he received payment from Ellzey. Taussig and its insurer contend that the sale was complete when the agreement was entered into on the morning of December 3, before the car was sold to the Foys.

Ellzey testified that prior to the time he sold the car to the Foys, he offered Gardiner $150.00 for it, but that this offer was refused and that Gardiner made a counter offer to sell it to him for $200.00. He stated that he did not accept that counter offer until some time during the afternoon of December 3, after the Foy sale had been completed. He also stated that he informed the Foys at the time he sold them the car that it belonged to Taussig, that if he bought the car from Taussig he would invoice it to them, but that if he did not do so the car would be invoiced to them by Taussig. He testified that at the time he accepted Gardiner's counter offer, he informed Gardiner that he had already sold the car, and his interpretation of the entire transaction was simply that "there was $350.00 I got for the car and they got two hundred and I got a hundred and fifty."

When the car was sold to the Foys, a document designated as a "Retail Buyer's Order" was signed by Ellzey and by Mrs. Foy. This document gives the description of the car and the terms of the sale, and the evidence shows that it customarily had been used by Taussig as a bill of sale. The form used indicates on its face that Taussig was the seller and that Mrs. Foy was the buyer. Ellzey signed it as a "Salesman" of the Seller. He noted on the form that the price had

been paid in cash. The evidence also indicates that LaPointe was an employee of Taussig at the time he went out to repair the accelerator, and that fact further tends to support plaintiff's contention that the car was sold by Taussig.

The jury apparently concluded that the car was sold by Taussig, rather than by Ellzey, because such a finding was essential to the verdict which was rendered. We cannot say that the jury erred in that finding. We conclude that Taussig was the seller, and that the transaction which was entered into between Gardiner and Ellzey after the Foy sale merely constituted an agreement as to the commission which Ellzey was to receive for the sale of the car or as to the manner in which the proceeds of the sale were to be divided.

Taussig and its insurer contend, alternatively, that even though the car may have been owned by Taussig at the time of the Foy sale, Ellzey was not an employee or agent of Taussig at that time, and that he was not acting in the furtherance of Taussig's affairs. This contention is based on Taussig's claim that the used car lot had been sold to Ellzey before December 3, 1966, that Ellzey's employment by Taussig had been terminated prior to that date, and that Ellzey thus did not represent Taussig in any capacity when the car sale was made to Mrs. Foy.

The evidence shows that Ellzey purchased the used car lot business from Taussig about that time. Taussig's version of the transaction was that the deal was completed and became effective on December 1, 1966,

when the parties orally agreed that the transfer was to be made. Taussig concedes that a formal written agreement to that effect was not executed by the parties until about noon, on December 3, 1966, which was after the Foy sale had been completed, but it contends that there had been a meeting of the minds before that time, and that the written contract was signed later merely to evidence their prior oral agreement. Ellzey's version of the transaction was that there was not a meeting of the minds, and thus that the sale of the car lot was not completed, until the early afternoon of December 3 when the papers were actually executed. Ellzey's testimony is supported by that of his attorney who was present when the written act of transfer was formally executed.

As we have already noted, a Taussig sign was still up in the car lot when the Foys purchased the car, and in connection with that sale a Taussig bill of sale was used, with Ellzey signing as a salesman for Taussig. The evidence also shows that Ellzey was still driving a Taussig demonstrator on the morning of December 3, and that the parties did not agree on some matters relating to the sale, such as the payment of taxes and removal of the signs, until about noon, on December 3, immediately prior to signing the act which completed the transfer of the used car lot.

The evidence convinces us that the sale of the used car lot was not completed until after the Pontiac automoblie had been sold to the Foys. At the time of the sale Ellzey was acting as the agent of Taussig, and

the agreement which he entered into with the Foys was binding on Taussig.

Plaintiff contends that under the provisions of LSA-C.C. arts. 2475 and 2476 Taussig, as the seller of the Pontiac automobile, is bound to have warranted the thing sold as being free from defects. She takes the position that there has been a breach of that warranty, in that the accelerator of the car stuck, and that she, as natural tutrix of her children, is entitled to recover from the seller the damages which they sustained as a result of that defect or vice. She relies primarily on the provisions of articles 2545 and 2547 of the Louisiana Civil Code, and on the case of Meche v. Farmers Drier & Storage Company, 193 So. 2d 807 (La. App. 3d Cir. 1967).

The cited articles of the Civil Code provide that:

> "Art. 2545. The seller, who knows the vice of the thing he sells and omits to declare it, besides the restitution of the price and repayment of the expenses, is answerable to the buyer in damages."

> "Art. 2547. A declaration made by the seller, that the thing sold possesses some quality which he knows it does not possess, comes within the definition of fraud, and ought to be judged according to the rules laid down on the subject, under the title: *Of Conventional Obligations.*

> "It may, according to circumstances, give rise to the redhibition, or to a reduction of the price, and to damages in favor of the buyer."

In Meche v. Farmers Drier & Storage Company, supra, we stated that:

> "A manufacturer or seller of a product which involves a risk of injury to the user is liable to any person, whether the purchaser or a third person, who without fault on his part sustains an injury caused by a defect in the design or manufacture of the article, if the injury might have been reasonably anticipated. Smith v. New Orleans & Northeastern Railroad Co., La. App. 1 Cir., 153 So.2d 533; Samaha v. Southern Rambler Sales, Inc., La.App. 4 Cir., 146 So.2d 29; Restatement of Torts 2d, Section 402(A); Prosser, The Law of Torts, Chapter 19 (3d ed., 1964); 65 C.J.S. Negligence Section 100(2). Cf. also: Percy, Products Liability — Tort or Contract or What?, 40 Tul.L.Rev. 715 (1966); Note, Torts — Strict Liability of the Manufacturer, 23 La.L.Rev. 810 (1963)."

Defendant Taussig, in resisting plaintiff's demands, specially pleads and contends that no warranty of any kind was made by Taussig, or by any of its employees, relative to the automobile sold to the Foys. In that connection, Taussig points out that not only was there no specific warranty of the automobile which was sold, but that the purchaser, Mrs. Foy, specifically waived any warranty which may be implied by law.

The "Retail Buyer's Order," or the bill of sale, which was executed by Ellzey and Mrs. Foy at the time the car was sold contains the following provision:

> "In the event this order is for a used car it is specifically understood between the buyer and seller that this sale is made without any warranty whatsoever, expressed or implied, except as to title, and the buyer herein specifically waives the implied warranty provided for by Louisiana law, including all warranties against vices or defects or fitness for any particular purpose. This express waiver shall be considered a material and integral part of any sale which may hereafter be entered into between the parties covering the automobile herein described."

LSA-C.C. art. 2476 provides that "The warranty respecting the seller has two objects; the first is the buyer's peaceable possession of the thing sold, and the second is the hidden defects of the thing sold or its redhibitory vices." This implied warranty, however, may be waived by the purchaser. Article 1764 of the Civil Code provides that "All things that are not forbidden by law may legally become the subject of, or the motive for contracts," and that:

> "Things which, although not essential to the contract, yet are implied from the nature of such agreement, if no stipulation be made respecting them, but which the parties may expressly modify or renounce, without destroy-

ing the contract or changing its description; of this nature is warranty, which is implied in every sale, but which may be modified or renounced, without changing the character of the contract or destroying its effect."

The above quoted provisions of the Retail Buyer's Order constitutes an effective waiver of the warranty implied by law, unless the parties for some other reason are not bound by that waiver.

Plaintiff contends that the waiver is not binding on the purchaser, Mrs. Foy, or on her children, because of fraud on the part of the seller. The fraud, she argues, consisted of Taussig's failure to disclose to her or to her husband the fact that the accelerator had been sticking. In support of her arguments to that effect, she refers us to LSA-C.C. art. 2548 and to the case of Roby Motors Co. v. Price, 173 So. 793 (La. App. 2d Cir. 1937).

Article 2548 of the Civil Code provides that "The renunciation of warranty, made by the buyer, is not obligatory, where there has been fraud on the part of the seller."

In the Roby Motors Company case, supra, the seller of a used car sued the purchaser for the balance alleged to be due on the purchase price. The purchaser resisted on the ground that the car was afflicted with redhibitory vices, and she reconvened for the amounts which she has paid on the purchase price. The purchaser in that case had signed a waiver of warranty, as did

plaintiff in the instant suit. The court found, however, that the car had "serious mechanical defects and vices," that the seller had "grossly misrepresented" its mechanical condition, and that this gross misrepresentation constituted sufficient fraud to nullify the waiver of warranty relied on by the Plaintiff.

The cited case is not applicable here, because there the reconventional demand filed by the defendant in effect was a redhibitory suit, whereas the instant case is a tort action. Also, the plaintiff in reconvention was the purchaser of the car, whereas the claims we are considering here are for and in behalf of plaintiff's children, none of whom had had any contractual relationship with the defendants. We, nevertheless, have considered the rule applied in that case relating to the waiver of warranty.

In the instant suit the evidence does not show that the seller, or any of its agents, made any representation to the Foys relating to the mechanical condition of the car before the sale of that car was completed. It is true that the accelerator of the car had stuck about one month before it was sold to plaintiff, that Taussig's agents were aware of that fact, and that this information was not given to Mr. or Mrs. Foy. But, the record does not show that any facts were misrepresented to the Foys prior to the sale. The defendants did not represent to them that the car was in good mechanical condition, or that the accelerator would not stick. No false representations as to the mechanical condition of the car, therefore, were made to the Foys, and thus there was no fraud on the part

of the seller. The waiver of warranty which was executed by Mrs. Foy is valid, therefore, and it has not been nullified by fraud on the part of the seller.

Since the warranty implied by law had been waived, there is no necessity for us to determine whether plaintiff may recover in behalf of her children on the grounds that there has been a breach of warranty.

Although Taussig did not warrant the car to be free from defects or vices when it was sold, it did undertake to repair the sticking accelerator a few hours later; and the Taussig employee who made the repairs informed Mrs. Foy that "it was fixed and it was ready to go, it was all right." We interpret these statements by the mechanic as an assurance to Mrs. Foy that the accelerator would not stick anymore and that it would be safe to use the car. The mechanic obviously was mistaken, because the accelerator did stick within a few hours after he had worked on it. Plaintiff and her husband, relying on that representation made by Taussig's employee, undertook to use the car, and the failure of the accelerator to function properly has been found to be a proximate cause of the accident.

The question is presented as to whether Taussig and its employees, Ellzey and LaPointe, were negligent in failing to properly repair the sticking accelerator, and in incorrectly informing the owner of the car that the necessary repairs had been made and that it was safe to drive the vehicle. If they are found to have been negligent in those particulars, then the further

question is presented of whether that negligence was a proximate cause of the accident.

The general rule is that recovery may be had against a repairman for personal injuries sustained after the making of repairs to a motor vehicle, if the evidence establishes that the repairman was negligent in making the repairs, that there was a causal relationship between the negligent repair work and the subsequent accident, and that the negligence of the repairman was a proximate cause of the accident. See Drummond v. American Ins. Co., 159 So. 2d 61 (La. App. 1st Cir. 1963); Miller v. Margot, 42 So.2d 916 (La. App. 1st Cir. 1949); Swillie v. General Motors Corporation, 133 So. 2d 813 (La. App. 3d Cir. 1961); Smith v. Roberts, 268 S.W. 2d 635 (Ky. 1953); Oliver v. Bereano, 267 App. Div. 747, 48 N.Y.S. 2d 142 (N.Y. 1944); Hepp v. Quickel Auto & Supply Co., 25 P. 2d 197 (N.M. 1933); Glassman v. Goldman, 35 Misc. 2d 429, 230 N.Y.S. 2d 947 (N.Y. 1962); Spolter v. Four-Wheel Brake Service Co., 222 P. 2d 307 (Cal. 1950); Johnson v. Land O'Lakes Motor Co., 16 N.W. 2d 466 (Minn. 1944); Kalinowski v. Truck Equipment Co., 237 App. Div. 472, 261 N.Y.S. 657 (N.Y. 1933); 61 C.J.S., Motor Vehicles, Section 739, p. 886; 38 Am. Jur. 2d, Garages etc., Section 128, pp. 422-423; 92 A.L.R. 2d, Garageman- Defective Work - Liability, 1408 et seq., and cases cited therein.

We think that general rule of law is applicable here. In the instant suit it is obvious that the repairman LaPointe, did not properly repair the sticking accelerator. It continued to stick after he worked on the car

and after he had advised the owner that the defect had been corrected.

LaPointe testified that he did very little work on the car — so little, in fact, that he did not bother to turn in a statement to his employer for the time he had spent. He did not start the motor of the car or drive it after the repair work was done in order to determine whether the accelerator functioned properly. The only test which he performed to determine whether his repair work was adequate was to depress the accelerator while the car was parked and the motor not running. We think he was negligent in failing to make a more complete or thorough test of the car before he advised Mrs. Foy that it was safe to drive it. His negligence in that respect, we believe, was a proximate cause of the accident.

Taussig, as the employer of LaPointe, is responsible for this negligence of the latter in repairing the accelerator. We find, however, that Ellzey was not negligent. He was neither the repairman nor the employer, and the evidence does not show any negligence on his part.

Our conclusion is that defendant Taussig and its employee, LaPointe, were negligent in failing to properly repair the accelerator of the Foy automobile, and in advising plaintiff, in effect, that the accelerator thereafter would not stick and that it would be safe for them to use the car. Their negligence in that respect was a proximate cause of the accident. We think plaintiff is entitled to recover, for and in behalf of her

minor children, from Taussig and its insurer, Travelers, and from LaPointe.

One of plaintiff's children, Scotty Joe Foy, seven years of age, sustained injuries consisting of multiple lacerations of the upper lip and lower lip, fractures of the maxilla, and the loss of three permanent teeth. He received prompt and adequate medical treatment. The fractures were repositioned and realigned, the remaining teeth were brought back into position and the teeth and jaw were fixed with wires. He was hospitalized for seven days immediately after the accident occurred, and about one month later he was hospitalized again for about 36 hours, at which time the wires were removed. The evidence shows that he made an excellent recovery, that he has no residual disability, but that he has sustained the permanent loss of three teeth and some relatively minor permanent scars on his face. We think an award of $7500.00 for the injuries sustained by Scotty Joe Foy would be fair and adequate.

LeRoy Foy, 10 years of age, sustained lacerations of the left upper lip, chin, left anterior chest and left upper arm. There was a contusion or bruise of the right knee and a large abrasion of the forehead. The treatment which he received consisted largely of cleaning and debriding the wounds, and the giving of a tetanus booster shot. He was hospitalized for three days, and he remained under the care of a doctor for a period of approximately two weeks. He is left with some relatively minor permanent scars of the

lip and chin. We think an award of $1000.00 should be made for the injuries sustained by this child.

Tommy Ray Foy, 14 years of age, sustained abrasions and contusions of the left side of his face, a large contused type of laceration over the tibial region of the left leg, and some intra-abdominal injuries, with internal bleeding. Exploratory surgery was performed to determine the nature of the internal injuries, and it revealed that the boy had a three inch laceration of the right lobe of the liver. The lacerations of the liver and of the leg were sutured. Tommy was hospitalized for seven days, and was confined to his home until December 29. He was allowed to return to school on the last mentioned date, but the doctor advised that he not participate in strenuous activities at that time. He was discharged as being fully recovered on January 21, 1967. He is left, however, with a permanent scar on his abdomen as a result of the surgery which was performed, and another scar on his leg. We think an award of $3000.00 for his injuries would be proper.

For the reasons herein set out, that portion of the judgment appealed from which condemns defendants, Taussig and Travelers, to pay damages unto plaintiff, Mrs. Violet Rose Foy, individually, is reversed, and judgment is hereby rendered in favor of said defendants, rejecting the demands of the said Mrs. Violet Rose Foy, individually. The remaining portions of the judgment appealed from are amended to decree that defendants Taussig, Travelers and Rufus LaPointe,

are condemned, jointly, individually and in solido, to pay to plaintiff, Mrs. Violet Rose Foy, as Natural Tutrix of the minor Scotty Joe Foy, the sum of $7500.00; and as Natural Tutrix of the minor LeRoy Foy, the sum of $1000.00; and as Natural Tutrix of the minor Tommy Ray Foy, the sum of $3000.00; all with interest at the rate of 5 percent per annum from May 2, 1967, until paid, and all costs of these proceedings. Except as herein specifically reversed or amended, the judgment appealed from is affirmed. The costs of this appeal are assessed to defendants, Taussig, Travelers, and LaPointe.

Reversed in part, and amended and affirmed in part.

SAVOY, J., dissents being of the opinion that the Jury Verdict and Judgment of the district court are erroneous and that the judgment should be reversed.

On Application for Rehearing.

En Banc. Rehearings denied.

APPENDIX "C"

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

June 9, 1969

MRS. VIOLET ROSE FOY, INDIVIDUALLY AND AS TUTRIX OF HER MINOR CHILDREN, TOMMY RAY FOY, SCOTTY JOE FOY AND LEROY FOY

versus No. 49,833

ED TAUSSIG, INC., AND TRAVELERS INSURANCE COMPANY AND EDDIE L. ELLZEY AND RUFUS LAPOINTE

In re: Mrs. Violet Rose Foy, etc. applying for certiorari, or writ of review, to the Court of Appeal, Third Circuit, Parish of Calcasieu

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The application is denied.

According to the facts of this case as found to be by the Court of Appeal, there appears no error of law in the judgment complained of.

/s/ JBF
/s/ JBH

/s/ EHMcC
/s/ WBH
/s/ JWS
/s/ MEB

SUMMERS, J., is of the opinion the writ should be granted.

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans, June 9, 1969
/s/ Harold A. Moise, Jr.
Deputy Clerk

SUPREME COURT, U. S.

FILED
OCT 18 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. 564

MRS. VIOLET ROSE FOY,
Individually, and as Tutrix of her minor children,
TOMMY RAY FOY, SCOTTY JOE FOY and LEROY FOY,
Plaintiff-Appellee,

versus

ED TAUSSIG, INC.,
and
THE TRAVELERS INSURANCE COMPANY,
Defendants-Appellants.

REPLY TO THE PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1969

No. 564

MRS. VIOLET ROSE FOY, Individually, and as Tutrix of her minor children, TOMMY RAY FOY, SCOTTY JOE FOY and LEROY FOY,

Plaintiff-Appellee,

versus

ED TAUSSIG, INC.
and
THE TRAVELERS INSURANCE COMPANY,

Defendants-Appellants.

REPLY TO THE PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

To The Honorable United States Supreme Court:

The Respondents, Ed Taussig, Inc. and The Travelers Insurance Company, respectfully pray that this Honorable Court deny the application.

RESPONSE TO THE "REASONS FOR GRANTING THE WRIT"

The fundamental question raised by petitioner is whether or not a state appellant court may review

the facts in a civil case tried before a jury in a lower court and not be in violation of the Seventh and Fourteenth Amendments to the United States Constitution.

This issue was raised in the case of *Walker vs. Sauvinet*, 92 U.S. 90, 23 L.Ed. 678, (1875), in which Mr. Chief Justice Waite considered the applicability of the Seventh Amendment to a state civil action.

> "The states, so far as this Amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the state courts is not, therefore, a privilege or immunity of national citizens, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met, if the trial is had according to the settled course of judicial proceedings." (Page 679).

The case of *Walker vs. Sauvinet*, supra. has been followed in numerous cases since its rendition in 1875. In the case of *New York Central R.R. Co. vs. White*, 243 U.S. 188, 37 S.Ct. 247, (1917), this Court held:

> "No question is made but that the procedural provisions of the act are amply adequate to afford the notice and opportunity to be heard re-

> quired by the 14th Amendment. The denial of a trial by jury is not inconsistent with 'due process'. Walker vs. Sauvinet, 92 U.S. 90, 23 L.Ed. 678; Frank vs. Mangum, 237 U.S. 309, 340, 59 L.Ed. 960, 985, 35 S.Ct. Rep. 582." (Page 254).

A trial of a workmen's compensation claim without a jury was thus held to be consistent with due process which clearly indicates that there is no constitutional or statutory mandate requiring a trial by jury in a state civil action.

The issue was again considered in the case of *Hardware Dealers' Mutual Fire Insurance Company vs. Glidden Company,* 284 U.S. 151, 52 S.Ct. 69, (1931), in which this Court stated:

> "The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure. See Missouri, ex rel Hurwitz vs. North, 271 U.S. 40, 70 L.Ed. 818, 46 S.Ct. 384. In the exercise of that power and to satisfy a public need, a state may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard." (Page 71)

The case of *Hardware Dealers Mutual Fire Insurance Company vs. Glidden Company,* supra., clearly

stands for the proposition that the Seventh Amendment has no applicability to a state's judicial system with respect to civil matters. The recent case of *Olesen vs. Trust Company of Chicago,* 245 F. 2d 522 (7th Cir. 1957), certiorari denied 355 U.S. 896, 78 S.Ct. 270, succinctly stated the law as applied to jury trials in a state civil matter.

> "It is clear there is no Federal question involved in the case at bar. The Seventh Amendment of the United States Constitution applies to trials in the United States courts. Bute vs. People of State of Illinois, 333 U.S. 640, 657 (footnote), 68 S.Ct. 763, 92 L.Ed. 986. Trial by jury in civil actions in state courts may be modified by a state or abolished altogether. Walker vs. Sauvinet, 92 U.S. 90, 23 L.Ed. 678; Maxwell vs. Dow, 176 U.S. 581, 20 S.Ct. 494, 44 L.Ed. 597; New York Central R.R. Co. vs. White, 243 U.S. 188, 208, 37 S. Ct. 247, 61 L.Ed. 667; Wagner Electric Manufacturing Company vs. Lindon, 262 U.S. 226, 232, 43 S.Ct. 589, 67 L.Ed. 961.
>
> A denial of trial by jury in a state court is not a denial of due process of law under the Fourteenth Amendment. 'The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure.' Hardware Dealers' Mutual Fire Insurance Company of Wisconsin v. Glidden Company, 284 U.S. 151, 158, 52 S.Ct. 69, 71, 76 L.Ed. 214." (Page 524).

This Honorable Court has recently denied writs of certiorari in three cases appealed from decisions of the courts of Louisiana. They are: *Sule vs. Missouri Pacific Railroad Co.*, 385 U.S. 819, 87 S.Ct. 46 (1966); *King vs. Vico Insurance Company of St. Louis*, 385 U.S. 841, 87 S.Ct. 90 (1966); *Broussard vs. State Farm Mutual Automobile Insurance Company*, 386 U.S. 909, 87 S.Ct. 855 (1967). These cases all involved appeals taken from verdicts reached by a jury. In each case the jury verdict was either reversed or modified. In each case this Honorable Court denied writs of certiorari.

It is therefore submitted that the issue presented by petitioner has been disposed of by this Honorable Court on numerous occasions and adversely to the position asserted by the petitioner.

WHEREFORE, respondents, respectfully pray that this Honorable Court deny the petition for writ of certiorari to the Supreme Court of the State of Louisiana.

Respectfully submitted,

HOLT & WOODLEY

EDMUND E. WOODLEY

CERTIFICATE

I CERTIFY that a copy of the foregoing has been served upon the parties hereto by U. S. mail, postage prepaid, as follows:

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Mr. William B. Baggett
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Lake Charles, Louisiana, this ____ day of October, 1969.

EDMUND E. WOODLEY